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No. 95-226

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT A. HAVERSAT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner should be compared with other antitrust defendants, rather than all criminal defendants, in determining whether his charitable activities were "atypical" and thus a permissible ground for departure under the Sentencing Guidelines.

2. Whether the court of appeals impermissibly limited the circumstances that would justify a departure for good character to those in which a defendant struggles to overcome obstacles.

3. Whether a court may depart on the basis of a defendant's assistance to the administration of justice when the defendant is not eligible for a departure for acceptance of responsibility under Guidelines § 3E1.1, and the government has not requested a departure for assistance to the prosecution under Guidelines § 5K1.1.

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OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. A1-A19) is reported at 22 F.3d 790. The second opinion of the court of appeals (Pet. App. B1-B3) is unpublished, but the decision is noted at 53 F.3d 335 (Table).

JURISDICTION

The judgments of the court of appeals were entered on April 22, 1994 and May 2, 1995. Pet. App. A1, B1. A petition for rehearing was denied on July 6, 1995. Pet. App. E1. The petition for a writ of certiorari was filed on August 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded nolo contendere to a one-count indictment filed in the United States District Court for the Eastern District of Missouri charging petitioner and others with conspiring to fix prices, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court ordered petitioner to pay a $250,000 fine. Pet. App. A4-A5. On cross-appeals, the court of appeals affirmed on the sentencing issues raised by petitioner, reversed on the sentencing issues raised by the government, vacated the sentence imposed, and remanded for resentencing. Pet. App. A1-A19. The district court then sentenced petitioner to four months' imprisonment to be followed by 12 months' supervised release. The court of appeals affirmed. Pet. App. B1-B3.

1. Petitioner was the president of McKinney Products Company when McKinney and three other companies agreed to fix the prices on architectural hinges. Pet. App. A3. Architectural hinges are durably constructed door hinges used in heavily trafficked buildings. In May 1986, petitioner attended two meetings at which he and others agreed to the price fixing scheme. The scheme continued well into 1988, and the participants made millions of dollars during its operation. *Id.* at A3-A4.

The Justice Department initiated a grand jury investigation after receiving information from a salesman concerning the conspiracy. Within days of receiving a grand jury subpoena, one of McKinney's coconspirators, the Hager Hinge Company, offered its cooperation to the government in exchange for immunity for the company's employees. Presentence Report at 4. The district court ultimately accepted

pleas of nolo contendere from petitioner and other co-conspirators. Before it accepted those pleas, however, the court insisted that McKinney and other co-conspirators settle related civil suits that were pending against them. See Def. C.A. App. (No. 94-3719) at 74-76.

At sentencing, petitioner claimed that his role in settlement of the civil suits and his "early" nolo plea qualified him for a reduction of sentence for acceptance of responsibility under the United States Sentencing Guidelines (U.S.S.G.), § 3E1.1. Petitioner urged that those same circumstances entitled him to a departure based on his assistance to the administration of justice. Def. C.A. App. (No. 93-2090) at 41-48, 51-53. Petitioner also argued that his good character justified a departure. *Id.* at 53-54. The district court departed downward from the applicable Guidelines range, citing, *inter alia*, petitioner's assistance to the courts and his good character. *Id.* at 187-191; Pet. App. A6-A7. The court found, however, that petitioner had not accepted responsibility for his conduct and therefore did not qualify for a reduction under Section 3E1.1. Def. C.A. App. (No. 93-2090) at 180-181. The court ordered petitioner to pay a $250,000 fine. Pet. App. A4-A5.

2. The court of appeals reversed the district court's downward departure and affirmed its denial of credit for acceptance of responsibility. The court held that good character as evidenced by charitable and volunteer activities can serve as a basis for downward departure provided "those activities are truly exceptional in nature." Pet. App. A10. It concluded, however, that petitioner's activities were not "extraordinary." *Id.* at A11. The court specifically noted that petitioner's co-defendants had "equally worthy

records" and that other high-level business executives in a position to violate the Sherman Act "also enjoy sufficient income and community status * * * to engage in charitable and benevolent activities." *Ibid.*

The court held that petitioner's assistance to the courts also did not warrant a departure. Pet. App. A7-A9. The court noted that it had previously held in *United States* v. *Garlich*, 951 F.2d 161 (8th Cir. 1991), that a defendant's early guilty plea "is a factor to be considered only in the acceptance of responsibility determination under U.S.S.G. § 3E1.1." Pet. App. A8. The court held that *Garlich*'s reasoning applied "with equal force" to petitioner's nolo plea. *Ibid.* The court further held that petitioner's claimed assistance in settling related civil litigation "is also more properly treated as a factor in relation to acceptance of responsibility." *Ibid.*

Finally, the court affirmed as not clearly erroneous the district court's denial of credit for acceptance of responsibility. Pet. App. A18. The court noted that petitioner did not admit his guilt and that he had continued to minimize his role throughout the proceedings. *Ibid.* The court also rejected petitioner's request that the district court be permitted to reconsider that issue on remand. The court stated that "the district court has already denied such a reduction and its finding will control on remand." *Ibid.*

3. On remand, the district court resentenced petitioner within the applicable Guidelines sentencing range. Consistent with the court of appeals' mandate, the district court rejected petitioner's invitation to reconsider its denial of credit for acceptance of responsibility. Pet. App. A18, B2-B3. The

court of appeals affirmed. It held that the district court had correctly followed its instruction not to revisit the acceptance of responsibility issue. Pet. App. B2-B3.

ARGUMENT

1. Petitioner contends (Pet. 5-14) that the court of appeals erred in failing to permit a departure for his charitable activities. That contention is without merit.

Guidelines § 5H1.11 provides that "civic, charitable, or public service * * * and similar good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." Accordingly, under the Guidelines, charitable activities can serve as a basis for departure only in a truly exceptional case. As the court of appeals concluded, because petitioner's activities were not exceptional when compared to other antitrust defendants, he was not eligible for a departure. Pet. App. A11.

Petitioner contends (Pet. 8) that the court erred in limiting its comparison to those who commit antitrust offenses. The Guidelines, however, authorize a departure from the prescribed sentencing range only if a case falls outside the "heartland" of "typical cases embodying the conduct that each guideline describes." U.S.S.G. Ch. 1, Pt. A(4)(b) (Policy Statement). If a defendant is not atypical of those covered by a particular Guideline, he falls within the "heartland" and is not eligible for a departure. Petitioner's contention that he should receive a departure for his charitable activities, even though his charitable activities are not atypical for an antitrust defendant, is inconsistent with the structure of the Guidelines

and the Sentencing Reform Act, which permits a departure only when there is "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. 3553(b).

Petitioner contends (Pet. 8-9) that the court's decision in this case conflicts with *United States* v. *DeMasi*, 40 F.3d 1306, 1323-1324 (1st Cir. 1994), cert. denied, 115 S. Ct. 947 (1995). That asserted conflict does not warrant review.

In *DeMasi*, the district court awarded a departure to a bank robber on the ground that his community service was atypical for a bank robber. The court of appeals reversed, holding that the district court had erred in failing to compare the defendant to other defendants with past records of commendable service. 40 F.3d at 1324. The court also held that the district court had erred in restricting the scope of its comparison to bank robber cases. *Ibid.* The court stated that "[a] court should survey those cases where the discouraged factor is present, without limiting its inquiry to cases involving the same offense, and only then ask whether the defendant's record stands out from the crowd." *Ibid.* It is the latter holding on which petitioner relies.

DeMasi did not confront a case similar to this one, in which the characteristic on which the defendant relies to support a departure is likely to be present in many, if not most, of the cases covered by the offense guideline. In that instance, it is likely that the guideline is already formulated to take account of that characteristic in its heartland. In such an instance, the usual presence of that characteristic (here, charitable activities by an antitrust defendant) would

not take the case out of the heartland. The First Circuit has recognized a similar principle. See *United States* v. *Rivera*, 994 F.2d 942, 955-956 (1993) (embezzlement guideline takes into account "normal restitution needs and practicalities," although special circumstances may warrant a departure); *United States* v. *Citro*, 938 F.2d 1431, 1439-1440 (1991) (comparing defendant's claim of addiction as basis for departure to other drug traffickers), cert. denied, 502 U.S. 1044 and 504 U.S. 931 (1992); *United States* v. *Aguilar-Pena*, 887 F.2d 347, 350 (1989) (stating that the correct inquiry is whether there is "something 'special' about a given offender, or the accouterments of the crime committed, which distinguishes the case from the mine-run for that offense"). Accordingly, the First Circuit, if confronted with a case like this one, would likely hold that a departure would not be permissible unless the defendant's charitable activities were exceptional when compared to other antitrust defendants.

In any event, the question whether a defendant should be compared to persons who have committed the same offense, all defendants, or both, is a question of Guidelines interpretation. Any conflict between the circuits on that issue is therefore best resolved by the Sentencing Commission. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). It does not warrant this Court's review.*

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* Petitioner contends (Pet. 10-11) that the decision below conflicts with *United States* v. *Takai*, 941 F.2d 738, 744 (9th Cir. 1991). There is, however, no such conflict. In that case, the defendant had been involved in a scheme to bribe officials to obtain green cards. The court held that the defendant's history showed that his crime was a single act of aberrant behavior, warranting a departure. *Id.* at 743-744. In reaching

2. Petitioner next contends (Pet. 14-16) that the court of appeals erred because it required him to show that he struggled to overcome obstacles in order to qualify for a downward departure based on good character and civic and charitable work. That contention is based on a misreading of the court of appeals' decision.

In the court below, petitioner sought to justify a departure for good character by relying on the Eighth Circuit's previous decision in *United States* v. *Big Crow*, 898 F.2d 1326, 1330, 1332 (1990). The court below rejected petitioner's reliance on *Big Crow* because that case involved a defendant who had struggled to overcome obstacles, and petitioner made no showing that he had engaged in a similar struggle. Pet. App. A9-A10. The court below did not hold, however, that a departure for good character is limited to circumstances in which a defendant has struggled to overcome obstacles. To the contrary, the court held that "[c]haritable or volunteer activities" may also serve as the basis for downward departure, if those activities are "truly exceptional in nature." *Id.* at A10. The court ruled that petitioner was not entitled to a departure on that ground, however, because his activities, "while laudable, [were] not extraordinary." *Id.* at A10-A11. Petitioner's contention that the court impermissibly limited good character departures to circumstances in which a defendant has struggled to overcome obstacles is therefore incorrect.

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that conclusion, the court did not address whether the proper comparison was to those who committed the same offense or to all defendants. *Ibid.*

3. Finally, petitioner contends (Pet. 17-22) that the court of appeals erred in failing to permit a departure based on his assistance to the administration of justice. In particular, petitioner contends that his nolo plea and his help in settling a civil suit justified a departure on that ground. That contention is without merit.

The Sentencing Commission specifically took the issue of cooperation by the defendant into consideration in formulating the Guidelines. First, a defendant may be rewarded for his cooperation under Guidelines § 3E1.1 when he accepts responsibility for his offense. Second, upon motion by the government, the district court may depart downward under Guidelines § 5K1.1 when the defendant provides substantial assistance in the investigation or prosecution of another person who has committed an offense. Here, however, the district court determined that petitioner was not entitled to a reduction for acceptance of responsibility under Section 3E1.1, and the government did not recommend a departure under Section 5K1.1. A defendant should not be permitted to circumvent that result by obtaining a departure based on assistance to the courts. *United States* v. *Dorsey*, 61 F.3d 260, 262-263 (4th Cir. 1995); *United States* v. *Shrewsberry*, 980 F.2d 1296, 1297-1298 (9th Cir. 1992), cert. denied, 114 S. Ct. 120 (1993); *United States* v. *Lockyer*, 966 F.2d 1390, 1391-1392 (11th Cir. 1992); cf. *United States* v. *Smith*, 953 F.2d 1060, 1063 (7th Cir. 1992). Accordingly, the court in this case correctly ruled that petitioner was not entitled to a departure for his assistance to the courts.

Petitioner contends (Pet. 20-22) that the court's refusal to permit a departure for assistance to the courts conflicts with *United States* v. *Garcia*, 926

F.2d 125 (2d Cir. 1991), and *United States* v. *DeMonte*, 25 F.3d 343 (6th Cir. 1994). On the facts of this case, however, there is no such conflict.

In *Garcia*, the Second Circuit permitted a downward departure for assistance to the courts because the defendant's "relatively early guilty plea and willingness to testify against codefendants induced [two codefendants] to enter guilty pleas," and " 'broke the log jam' in a multi-defendant case." 926 F.2d at 128. Petitioner did not render anything approaching the kind of assistance relied on in *Garcia*. Petitioner was not the first defendant to offer cooperation; Hager Hinge Company preceded him. See p. 2, *supra*. Nor did petitioner's nolo plea break a "log jam" in a multi-defendant case; the district court credited another defendant with breaking the log jam by his nolo plea. See U.S. C.A. Br. (93-2090), Addendum at 23. Moreover, the related civil cases were settled, not because of petitioner's initiative, but because the district court insisted that they be settled before it would accept nolo pleas in the criminal cases. See p. 3, *supra*. There is therefore no reason to believe that the Second Circuit would view petitioner's activities as sufficient to warrant a departure under *Garcia*. For similar reasons, petitioner's reliance on *Demonte* is misplaced. That case involved a defendant who subjected himself to increased liability by revealing new crimes to the government. 25 F.3d at 348. Petitioner did not do anything remotely comparable to that.

In any event, the question whether a departure may be based on a defendant's assistance to the courts turns on an interpretation of the Guidelines. Any differences between the court below and *Garcia* and

Demonte on that issue is best resolved by the Sentencing Commission. *Braxton*, 500 U.S. at 348.

4. This Court has granted certiorari in *Koon* v. *United States*, 116 S. Ct. 39 (Sept. 27, 1995) (No. 94-1664) and *Powell* v. *United States*, 116 S. Ct. 39 (Sept. 27, 1995) (No. 94-8842), to decide "[w]hether a district court's downward departure from the prescribed range of the United States Sentencing Guidelines based upon factors not expressly prohibited as grounds for departure is to be reviewed under the de novo standard * * * or under the deferential standard set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993), and other cases." 94-1664 Pet. i. Although the court of appeals in this case applied a de novo standard of review, petitioner has not challenged the decision on that ground. Moreover, the questions presented by petitioner all turn on an interpretation of the relevant Guidelines provisions, and under *Rivera*, such questions are subject to de novo review. 994 F.2d at 951. For those reasons, this case need not be held pending the decision in *Koon* and *Powell*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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